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No. 87-641

In The
Supreme Court of the United States
October Term, 1987

ERWIN N. SOBCZYK,
Petitioner,

v.

THE AETNA CASUALTY AND SURETY COMPANY and MILWAUKEE TEACHERS EDUCATION ASSOCIATION,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

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ISSUE PRESENTED FOR REVIEW

Whether the Court of Appeals of Wisconsin correctly held that the trial court erred in denying respondents' renewed motion for summary judgment for dismissal of the complaint based upon § 103.54, Wis. Stat., preclusion of liability against the respondents where it was undisputed that the MTEA did not authorize, participate in or ratify its members' acts?

TABLE OF CONTENTS

	Page
ISSUE PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES CITED	iii
WISCONSIN STATUTE INVOLVED	1
STATEMENT OF LACK OF GROUNDS FOR JURISDICTION	1
STATEMENT OF THE CASE	5
A. Nature of the Case	5
B. Statement of Facts	6
ARGUMENT	10
I. THE COURT OF APPEALS OF WISCONSIN PROPERLY HELD THAT JUDGMENT SHOULD HAVE BEEN ENTERED IN FAVOR OF MTEA ON THE RENEWED MOTION FOR SUMMARY JUDGMENT	10
A. The Union Did Not Authorize The Illegal Acts	12
B. The Union Did Not Participate In The Illegal Acts	12
C. The Union Did Not Ratify The Illegal Acts	14
CONCLUSION	16

TABLE OF AUTHORITIES CITED

Page

CASES CITED

Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. —, 95 L.Ed. 2d 474 (1987) 2

Cobb v. Simon, 119 Wis. 597, 97 N.W. 176 (1903) 15

Consolidated Coal Co. v. United Mine Workers, 500 F. Supp. 72 (D. Utah 1980) 13

Danielson v. United States Seafood Workers, 405 F. Supp. 396 (S.D.N.Y. 1975) 13

Falls Stamping & Welding Co. v. United Automobile Workers, 744 F.2d 521 (6th Cir. 1984) 15

Gnat v. Westchester Fire Insurance Co., 167 Wis. 274, 167 N.W. 250 (1918) 14

Messner v. Briggs & Stratton Corp., 120 Wis. 2d 127, 353 N.W.2d 363 (Ct. App. 1984) 10

North River Energy Corp. v. United Mine Workers, 664 F.2d 1184 (11th Cir. 1982) 12, 13

Sobczyk v. Aetna Cas. & Sur. Co., No. 86-0532, slip op. (Wis. Ct. App. June 12, 1987) 3, 6

Spitz v. Continental Cas. Co., 40 Wis. 2d 439, 162 N.W. 2d 2 (1968) 10

State v. Wickstrom, 134 Wis. 2d 158, 396 N.W. 2d 188 (1986) 11

Street v. New York, 394 U.S. 576 (1969) 2

United Mine Workers v. Gibb, 383 U.S. 715 (1966) 14

United States Steel Corp. v. United Mine Workers of America, 519 F.2d 1236 (5th Cir. 1975) 13

United Steelworkers of America v. Lorain, 616 F.2d 919 (5th Cir. 1975) 15

Webb v. Webb, 451 U.S. 493 (1981) 2, 3, 4

Younger v. Harris, 401 U.S. 37 (1971) 4

TABLE OF AUTHORITIES—Continued

Page

STATUTES CITED

28 U.S.C. § 1257(3) 1, 4
29 U.S.C. § 106 (1982) 3, 11
29 U.S.C. § 185 (1982) 11
§ 103.54, Wis. Stat. ..... *passim*
§ 802.08, Wis. Stat. 5, 10

OTHER AUTHORITIES CITED

U.S.S.Ct. R. 21.1(h) 1
U.S.S.Ct. R. 49.2 ..... 2, 16

WISCONSIN STATUTE INVOLVED

103.54 Responsibility for unlawful acts.

No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute (as these terms are defined in s. 103.62) shall be held responsible or liable in any civil action at law or suit in equity, or in any criminal prosecution, for the unlawful acts of individual officers, members, or agents, except upon proof by a preponderance of the evidence and without the aid of any presumptions of law or fact, both of (a) the doing of such acts by persons who are officers, members or agents of any such association or organization, and (b) actual participation in, or actual authorization of, such acts, or ratification of such acts after actual knowledge thereof by such association or organization.

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STATEMENT OF LACK OF GROUNDS FOR JURISDICTION

Sobczyk asserts jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3). To invoke this Court's jurisdiction under this section, Sobczyk must have specially set up or claimed under the Constitution or statutes of the United States the right which he now seeks to have this Court enforce. 28 U.S.C. § 1257(3). *Webb v. Webb,* 451 U.S. 493, 495 (1981).

Further, this Court's Rule 21.1(h) mandates that Sobczyk specifically set forth in his petition "the stage in the proceedings, both in the court of first instance and in the

appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court."

Sobczyk has simply failed to establish that he ever raised a federal question in any Wisconsin court or that the Court of Appeals of Wisconsin expressly passed upon a federal question. Sobczyk's failure to set forth the procedural prerequisites to invoking this Court's jurisdiction is not surprising since he did not present any federal question to the state courts, which addressed only the applicability and interpretation of a state statute to a basically undisputed factual situation. The issue presented to the Wisconsin courts involved solely state tort liability. Therefore respondents seek damages under Rule 49.2 because the petition is frivolous.

A review of the decision of the Court of Appeals of Wisconsin reveals that the court did not even implicitly, let alone explicitly, pass upon any federal question. Therefore, this Court "will [assume] that the omission was due to want of proper presentation in the state courts," unless Sobczyk could have affirmatively shown the contrary. *Street v. New York*, 394 U.S. 576, 582 (1969), quoted with approval in *Webb*, 451 U.S. 495-96. "It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that *the federal question* was adequately presented in the state system." *Webb*, 451 U.S. 496-97 [citations omitted; emphasis supplied]. *See also Board of Directors of Rotary Internat'l v. Rotary Club of Duarte*, 481 U.S. —, 95 L.Ed. 2d 474, 487 (1987).

Sobczyk never states in his petition the federal question raised in the state courts. This case revolved around the interpretation and applicability of § 103.54, Wis. Stat. Although this state statute was held to have been based in part upon 29 U.S.C. § 106 (1982), the court noted that the state statute differed in the requisite burden of proof and in the prohibition of the use of presumptions. *Sobczyk v. Aetna Cas. & Sur. Co.*, No. 86-0532 slip op. at 5 (Wis. Ct. App. June 12, 1987). The court further held that federal case law was persuasive, not controlling, in its interpretation of the state statute. The interpretation of this statute is obviously a matter of state law.

This court has succinctly set forth its rationale for strictly adhering to the requirement that the federal question sought to be raised in this Court first be properly presented to the state courts.

> [T]here are powerful policy considerations underlying the statutory requirement and our own rule that the federal challenge to a state statute or other official act be presented first to the state courts. These considerations strongly indicate that we should apply this general principle with sufficient rigor to make reasonably certain that we entertain cases from state courts only where the record clearly shows that the federal issue has been properly raised below.
>
> In the first place, although the States are sovereign entities, they are bound along with their officials, including their judges, by the Constitution and the federal statutory law. Principles of comity in our federal system require that the state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based on the federal law, or, if the litigation is wholly pri-

vate, construing and applying the applicable federal requirements. As the Court has elsewhere observed, this principle of comity requires

> "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger v. Harris*, 401 U.S. 37, 44 (1971).

Webb, 451 U.S. at 499-500. This procedure also permits the parties to properly develop the record and to identify independent, adequate state grounds. *Id.* at 500.

For this Court to invoke its jurisdiction pursuant to 28 U.S.C. § 1257(3), it must be clear that the petitioner presented his claim under a *federal statute* or the *federal Constitution* in the state courts, which were advised of the federal claim "at the time and in the manner required by state law." *Webb*, 451 U.S. at 501.

Aetna and MTEA respectfully submit that Sobczyk failed to present any federal question in the state trial or appellate court proceedings. The Court of Appeals of Wisconsin did not decide a federal question. Therefore, this Court is without jurisdiction in this case. The respondents request that this Court deny the petition.

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STATEMENT OF THE CASE

A. Nature Of The Case

Erwin N. Sobczyk (Sobczyk) sued Milwaukee Teachers Education Association (MTEA) and its insurer, Aetna Casualty and Surety Company (Aetna), for injuries he sustained on June 5, 1980, at Pulaski High School. MTEA moved the trial court for summary judgment pursuant to §§ 103.54 and 802.08, Wis. Stat. The trial court denied the motion but invited reconsideration. The motion was renewed after judicial rotation, but the trial court refused to reconsider the motion. The matter proceeded to trial on November 11, 1985. During the trial, the court ruled that Sobczyk had failed to establish that MTEA ratified the acts of the Pulaski faculty. Therefore, the court instructed the jury that ratification was not an issue (R.103:944).

MTEA moved for a directed verdict at the close of Sobczyk's case and for dismissal at the close of all evidence, based upon statutory immunity pursuant to § 103.54, Wis. Stat. (R.102:823-36; 103:934-35). Both motions were taken under advisement and the matter was submitted to the jury, which returned a verdict on November 20, 1985, in favor of Sobczyk in the amount of $122,811.84. Motions after verdict were filed with the court on December 9, 1985. The trial court on January 13, 1986, granted both the motions after verdict and the motions taken under advisement (R.82).

Sobczyk appealed from the judgment dismissing the complaint. The Court of Appeals of Wisconsin (District I) released its decision on June 12, 1987, holding that the

trial court erred in refusing to grant the renewed motion for summary judgment. *Sobczyk,* slip op. at 4-5. The court also held that the failure of the defendants to serve their motions after verdict within twenty days was jurisdictional and deprived the trial court of the authority to decide those motions. The court did not reach other issues raised by the appeal and cross-appeal. Sobczyk filed a petition for review on July 10, 1987 with the Wisconsin Supreme Court. MTEA and Aetna petitioned for cross-review. Both petitions were denied on August 18, 1987.

B. Statement Of Facts

On May 12, 1980, a Pulaski teacher was violently attacked by a student when the teacher came to the aid of another student who was being beaten. When the assaulting student was brought to the administrative office, he loudly declared, "I'll get back and get you all" (R.102: 600-707). The student was temporarily suspended (R.100: 425). The administration agreed it was necessary to permanently expel him (R.102:711), for which school board action was necessary (R.99:185-86).

The action was on the board's agenda for a meeting on June 4, 1980 (R.99:188), but the quorum was destroyed before the matter was reached (R.102:712-13). The student, therefore, was to return to school on June 5, 1980. Pulaski faculty members at the board meeting were upset by this turn of events and considered this student a threat to their physical safety (R.100:424-25; 102:728, 754).

Early on June 5, 1980, an MTEA assistant director, who had learned of the faculty's dissatisfaction, called the

central office and suggested that the student be detained there (R.103:869-70). Also MTEA sent Ernest, an asistant executive director, to handle the Pulaski situation (R.100:492).

Buege, a teacher and chairman of Pulaski building representatives, learned during the evening of June 4, 1980, from calls from other teachers of the board's failure to act (R.100:422, 429). When he arrived at school on June 5, 1980, he was asked to meet informally in a room with various faculty members (not just building representatives or building committee members) (R.100:444, 449; 102:796). Ernest joined the meeting (R.100:496, 498).

Ernest advised against a walk-out or work stoppage. He went with Buege to the principal's office to discuss what could be done with the student. They contacted an administrative specialist for the public schools and discussed removing the student from Pulaski (R.99:253-54). Ernest suggested this solution (R.100:504; 102:798-99).

Buege returned to the room where other faculty members were and, together with those other faculty members, decided to convene a meeting of the entire staff. One of the teachers was asked to make a public address announcement asking the teachers to lock their doors and go to the library for a meeting (R.99:56-60).

Buege and the principal addressed the group. Ernest told the teachers that the student would be kept in the principal's office until he could be taken to the central office (R.100:513). The faculty then returned to their assignments (R.102:737). The meeting lasted about twenty minutes (R.100:513). No disciplinary actions were taken against any faculty member (R.100:368-69).

June 5, 1980 was locker clean-out day at Pulaski (R.100:308). Various sized trash cans were placed in the hallways by the custodial staff. While the meeting in the library was taking place, custodians had been assigned by their supervisor to watch for fires in the corridor. They were told not to pick up debris and to just stay out of the way (R.102:814, 821).

Contrary to these instructions, Sobczyk, a member of the custodial staff, was picking up debris in a first floor hallway when he was hit by a trash can thrown by an unknown person (R.101:572-73). He was injured and ultimately retired in November, 1981 (R.103:903-04, 909; 101: 580, 603; 103:882; 99:109-26; 101:615). The facts surrounding Sobczyk's injuries are irrelevant to the issue raised in this petition.

Sobczyk sued MTEA, alleging the Pulaski teachers' library meeting was a wildcat strike, causal of his injuries, for which MTEA was liable. MTEA moved the court for summary judgment, asserting that § 103.54, Wis. Stat., precluded liability. The court denied the motion, but invited reconsideration. After judicial rotation, the new judge refused to reconsider the motion (R.8; 33; 41).

Each school in the Milwaukee Public School System has a building committee made up of a group of teachers. This committee is neither founded upon nor created by the MTEA Constitution. It deals only with local matters, and its members (who need not be union members) have no power or authority (R.92:21).

Additionally, each school elects representatives to an assembly on a per capita basis. These representatives attend monthly meetings to vote on policy matters, are

charged with the responsibility of carrying out contract provisions and are not union officials. They otherwise have no constitutionally-conferred power or authority (R.92:Ex. 2 at 19-20; 99:198; 100:396; 103:850).

The union hierarchy consists of officers (elected by members) and paid staff (R.92: Ex. 2 at 1). These union officers, together with officers of other represented groups (substitute and student teachers, teacher aides, accountants, retirees), sit on the MTEA executive board, which is responsible for discussing issues of concern to members (R.92: Ex. 2 at 16-17; 102: 776). The paid union staff consists of the executive director, several assistant directors and field staff representatives (R.92: Ex. 27; 101:448). The paid union staff handle daily affairs and carry out policies set by the board and representative assembly (R. 92: Ex. 2 at 28).

MTEA represents 7,500 to 8,000 teachers (R.102:797), of which there were less than 120 at Pulaski on June 5, 1980. The Pulaski faculty can neither negotiate for nor bind the union (R.92: Ex. 1 at 1-3; 103:857).

The MTEA contract in effect on June 5, 1980, provided that teachers should not be required to be subject to "clear and imminent danger" (R.102:789), which language directly relates to people threatening teachers (R. 102:790; 103:846). It also included a "no strike" provision (R.92: Ex. 1 at 131). MTEA's policy was that teachers should "teach and grieve," airing their concerns through existing grievance procedures (R.100:460, 514). Finally, the MTEA Constitution required strike authorization by written secret ballot on a majority vote of the members (R.92: Ex. 2 at 27).

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE TRIAL COURT ERRED IN REFUSING TO GRANT MTEA'S RENEWED MOTION FOR SUMMARY JUDGMENT.

On appeal the court applies the same standard on summary judgment as does the trial court pursuant to § 802.08, Stats. Summary judgment is appropriate where the pleadings and other discovery in the record, together with any affidavits filed, demonstrate that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Messner v. Briggs & Stratton Corp.*, 120 Wis. 2d 127, 131, 353 N.W.2d 363, 365 (Ct. App. 1984). Once the movant has established a prima facie case for summary judgment, the burden shifts to the opposing party to produce *evidentiary* proof that creates material issues of fact. The opposing party may not rely on mere allegations or denials in the pleadings. *Spitz v. Continental Cas. Co.*, 40 Wis. 2d 439, 444-45, 162 N.W.2d 1, 3-4 (1968).

MTEA relied upon § 103.54, Wis. Stat., which provides that:

> no association or organization participating or interested in a labor dispute . . . shall be held responsible or liable in any civil action . . . for the unlawful acts of individual officers, members, or agents, except upon proof by a preponderance of the evidence and without the aid of any presumptions of law or fact, both of (a) the doing of such acts by persons who are officers, members or agents of any such association or organization, and (b) *actual participation in, or actual authorization of, such acts, or ratification of such acts after actual knowledge thereof by such association or organization.*

[Emphasis added.] This statute is based on § 6 of the Norris-LaGuardia Act. 29 U.S.C. § 106 (1982). The differences involve the burden of proof required (federal is clear and convincing) and the state prohibition on the use of presumptions.

A union's liability for authorization, participation or ratification of its members' illegal acts may arise also under § 301 of the Labor Management Relations (Taft-Hartley) Act of 1947, as amended. 29 U.S.C. § 185 (1982). Under that statute, general agency principles apply.

Section 103.54, Wis. Stat., is patterned *in part* after these federal statutes. Therefore, federal case law is persuasive, but not controlling. *State v. Wickstrom,* 134 Wis. 2d 158, 162, 396 N.W.2d 188, 190 (1986).

For purposes of the issue presented as a matter of law on the motion for summary judgment, the Pulaski MTEA members' acts were assumed to be unlawful under § 103.54, Wis. Stat. Only the state statute was invoked. Sobczyk never argued that this statute violated any federal constitutional rights or that it was repugnant to any federal statute or constitutional provision. Sobczyk argued to the Wisconsin appellate courts that he had established the union's liability pursuant to this state statute. Having failed to persuade those courts he has now changed strategies.

The underlying or historical facts of June 5, 1980, were not materially disputed by the parties in this regard. It is the legal effect of those acts which was disputed.

The focus of the court of appeals, and one which MTEA believes is correct, is whether the acts of Ernest

or the Pulaski faculty on June 5, 1980, or any subsequent conduct of the union constituted actual authorization by the union of the illegal acts, actual participation by the union in the illegal acts, or ratification of the illegal acts by the union. The facts discussed below are those from MTEA's original and renewed motion for summary judgment.

A. The Union Did Not Authorize The Illegal Acts.

Sobczyk argued pursuant to § 103.54, Wis. Stat., that the union had authorized the strike because the strike was called by the building committee. The documents submitted by MTEA establish unequivocally that the building committee had no authority to call a strike. Furthermore, Ernest, as an assistant executive director of MTEA, told the teachers that the strike would be illegal and urged them to return to work. Sobczyk failed to submit any evidentiary proof that would raise an issue of fact regarding MTEA's authorization. Therefore, the court of appeals correctly held that Ernest's acts of June 5, 1980, as well as those of the building committee, did not amount to union authorization. *See North River Energy Corp. v. United Mine Workers,* 664 F.2d 1184 (11th Cir. 1982) (mere fact that all union committee persons and officials failed to work during an illegal strike could not be construed as union participation and authorization).

B. The Union Did Not Participate In The Illegal Acts.

Sobczyk argued that pursuant to § 103.54, Wis. Stat., the union participated in the strike because (1) all MTEA members at Pulaski participated in the strike and (2)

Ernest, a union executive, negotiated an end to the strike. The first ground is frequently called the mass action theory. The court of appeals correctly held that these facts do not amount to union participation.

Sobczyk relied on *Danielson v. United States Seafood Workers,* 405 F. Supp. 396, 401 (S.D.N.Y. 1975), for the proposition that mass action binds the union because "large groups of men do not act collectively without leadership." The court in *North River,* 654 F.2d at 1194, however, held that if the evidence "is equally susceptible of interpretation that the individual union members were engaged in an adventure of their own," then the mass action theory does not support union liability. That a strike occurred is insufficient in itself to raise a presumption that the union, as an entity separate from its members, is responsible. *Id.* at 1192.

In this case, the applicable statute, § 103.54, Wis. Stat., does not permit presumptions of fact or law. Further, the total number of teachers who walked out was less than 1.6% of the union membership (120 of 7,500 to 8,000). Obviously this was not mass action, but rather an isolated adventure for which the union is not responsible.

Under no view of the facts could Ernest's acts be viewed as union participation in the illegal walk-out. His actions were directed toward first preventing the walk-out and then toward ending the illegal walk-out. A union is not liable for an unauthorized strike which its officials are trying to stop. *United States Steel Corp. v. United Mine Workers of America,* 519 F.2d 1236, 1253 (5th Cir. 1975). The court in *Consolidated Coal Co. v. United Mine Workers,* 500 F. Supp. 72, 75 (D. Utah 1980), held that

"if the union members, on their own, choose to violate the agreement, despite the earnest and bona fide supplication of union officials," the union is not responsible.

Further, in *United Mine Workers v. Gibb,* 383 U.S. 715 (1966), as noted by the court of appeals, this Court held a union not liable in a situation where a union representative went to the scene of a violent, but legal, strike, took control of the situation and stopped the violence. This Court reasoned that the union "did what it could to stop or curtail the violence." *Id.* at 739. Ernest's actions in attempting to avert or stop the strike do not constitute union participation to make the union liable pursuant to § 103.54, Wis. Stat.

C. The Union Did Not Ratify The Illegal Acts.

Finally, Sobczyk argues that pursuant to § 103.54, Wis. Stat., the union ratified the strike by retaining benefits of the strike (i.e. the student was removed from the school) or by not disciplining the members who walked out. The court of appeals found neither of these factors persuasive on the issue of union ratification.

Sobczyk relied upon *Gnat v. Westchester Fire Insurance Co.*, 167 Wis. 274, 277, 167 N.W. 250, 251 (1918), for the proposition that retention of benefits of an unauthorized contract while repudiating the responsibilities constitutes ratification of the unauthorized contract. As noted, the only benefit Sobczyk asserts the union got was that the teachers were successful in getting the unruly, dangerous student out of the school. Moveover, Sobczyk's reference (Petitioner's Brief at 16) to union newspaper headlines and a non recrimination agreement should be

stricken because it was never admitted into evidence. Sobczyk also relied upon *Cobb v. Simon,* 119 Wis. 597, 606, 97 N.W. 176, 179 (1903), for the proposition that retention of a servant in employment after notice to the employer of the servant's tort is evidence of ratification.

What Sobczyk never has come to grips with in this argument is that there is no provision under MTEA's constitution and bylaws which would permit the union to discipline union members for an illegal strike or walk-out. Thus, Sobczyk failed to demonstrate a material issue regarding the union's ability to discipline its members.

Furthermore, the union's negotiating an end to the strike does not constitute ratification of the strike. The court in *Falls Stamping & Welding Co. v. United Automobile Workers,* 744 F.2d 521, 527 (6th Cir. 1984), rejected the assertion that the union's negotiating an end to a strike constituted a ratification of the strike and a retention of a benefit from the violation of the collective bargaining agreement. In *United Steelworkers of America v. Lorain,* 616 F.2d 919, 922-23 (6th Cir. 1980), *cert. denied,* 451 U.S. 985 (1981), the court held that the union's attempts to discuss grievances with the employer did not constitute ratification by the union.

Finally, a union is not required to sanction members illegally striking and may meet with the employer to expedite the strikers return to work. *Falls Stamping & Welding Co.,* 744 F.2d at 526; *United Steelworkers,* 616 F.2d at 923 (union's failure to sanction strikers, where sanctions not legally available to union, did not constitute union ratification). Therefore, the actions of the union

and Ernest do not constitute ratification of the illegal walk-out by the Pulaski teachers.

CONCLUSION

Based upon the foregoing reasons, the Aetna Casualty and Surety Company and Milwaukee Teachers Education Association respectfully request that this Court deny the petition for writ of certiorari and award damages pursuant to Rule 49.2.

Respectfully submitted,

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